Supreme Court, U.S.
FILED

(1)

93 1836 MAY 17

OFFICE OF THE CLERK

NUMBER _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

CAROL C. PEELER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arnold Anderson Vickery
COUNSEL FOR PETITIONER
ARCHER, WALDNER,
& VICKERY, L.L.P.
2929 Allen Parkway,
Suite 2770
Houston, Texas 77019
(713) 526-0700

QUESTIONS PRESENTED FOR REVIEW

Whether either the Fifth or Sixth Amendment to the United States Constitution affords a basis of relief to a person whose pre-indictment retained counsel betrays her by failing to communicate the Government's unequivocal offer of transactional immunity because he was being "loyal to the others" instead of his client?

Whether the Fifth Circuit's action in partially self-selecting the panel to consider this case on rehearing violates due process?

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

(1) Carol C. Peeler, Defendant/Petitioner;

(2) Arnold A. Vickery, of the firm of ARCHER, WALDNER, & VICKERY, L.L.P., 2929 Allen Parkway, Suite 2770, Houston, Texas 77019

(3) United States of America, Plaintiff/Respondent;

(4) Robert D. Lindsay, Chief, Criminal Division, Department of Justice - Tax Division, 10th & Constitution Avenue, N.W., Suite 4131, Washington, D.C. 20530

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CASES v
STATUTES AND RULES IX

REFERENCE TO LOWER COURT OPINION 1

GROUNDS FOR JURISDICTION 2

STATEMENT OF THE CASE 1

ARGUMENT 7

I. BOTH THE FIFTH AND SIXTH AMENDMENTS REQUIRE THE GOVERNMENT TO "HONOR, RESPECT AND PRESERVE" PEELER'S CHOICE OF COUNSEL AS THE "ESSENTIAL MEDIUM" OF COMMUNICATION BETWEEN THE GOVERNMENT AND HERSELF. 7

A. The Sixth Amendment "Ineffective Assistance" Analysis is NOT Coextensive with the "Critical Phase -- Appointment of Counsel Issue. 7

B. Peeler is Also Entitled to Relief Under the Fifth Amendment 18

C. Jordan's Deficient Representation Prejudiced Peeler 22

II. THE FIFTH CIRCUIT'S HANDLING OF THE CASE ALSO VIOLATES DUE PROCESS 26

CONCLUSION 31

PROOF OF SERVICE
CERTIFICATE OF SERVICE 34

Table of Authorities

CASES	PAGE
Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945)	30
Armstrong v. Board of Education, 323 F.2d 333, (5th Cir. 1963), cert. denied 376 U.S. 908 (1964)	29
Brewer v. Williams, 430 U.S., 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	13
Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970)	10, 11
Cuyler v. Sullivan, 464 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)	16, 24
Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)	14, 15, 16, 18

Escobedo v. Illinois,
378 U.S. 478,
84 S.Ct. 1758,
12 L.Ed.2d 977 (1964) 10

Evitts v. Lucey,
469 U.S. 387,
105 S.Ct. 830
83 L.Ed. 821 (1985) 19, 20

Hill v. Lockhart,
474 U.S. 52,
106 S.Ct. 366,
88 L.Ed.2d 203 (1985) 16

Irvin v. Dowd,
366 U.S. 717,
81 S.Ct. 1639 (1961) 30

Kimmelman v. Morrison,
477 U.S. 365,
106 S.Ct. 2574,
91 L.Ed.2d 305 (1986) 17

Kirby v. Illinois,
406 U.S. 682,
92 S.Ct. 1877,
32 L.Ed.2d 411 (1972) 10, 11

Lockhart v. Fretwell,
___ U.S. ___,
113 S.Ct. 838,
122 L.Ed.2d 180 (1993) 23

Patterson v. Illinois,
487 U.S. 285,
108 S.Ct. 2389,
101 L.Ed.2d 261 (1988) 14, 15, 18

Pennsylvania v. Finley
481 U.S. 551,
107 S.Ct. 1990 (1987) 9

Maine v. Moulton,
474 U.S. 159,
106 S.Ct. 484,
88 L.Ed.2d 481 (1985) 12, 13, 16, 20

Michigan v. Jackson,
475 U.S. 625,
106 S.Ct. 1404,
89 L.Ed.2d 631 (1986) 15, 25

Strickland v. Washington,
466 U.S. 668,
104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 22, 23, 24, 31

United States v. Gouveia,
467 U.S. 180,
104 S.Ct. 2292,
81 L.Ed.2d 146 (1984) 9, 10, 11

United States v. Williams,
___ U.S. ___,
112 S.Ct. 1735,
118 L.Ed.2d 352 (1992) 11

Wainwright v. Torna,
455 U.S. 586,
102 S.Ct. 1300,
71 L.Ed.2d 475 (1982) 7, 8, 9

STATUTES & RULES	PAGE
18 U.S.C. §371	5
28 U.S.C. §46(d)	27
28 U.S.C. §636(b)(1)	22
28 U.S.C. §1254(1)	xii
28 U.S.C. §2255	1, 2, 3, 4, 31, 33
Constitution of the United States of America, 5th Amendment	7, 8, 14, 15 17, 18, 22
Constitution of the United States of America, 6th Amendment	7, 8, 9, 10 11, 12, 13, 14 15, 16, 17, 18
Rule 10.1(a), Rules of the Supreme Court of the United States	26, 31
Rule 14(g), Rules of the Supreme Court of the United States	1

Rule 14(i), Rules of the Supreme Court of the United States 5

Rule 14.1(k), Rules of the Supreme Court of the United States xi

Rule 29.3, Rules of the Supreme Court of the United States 34

Rule 34, Federal Rules of Appellate Procedure 28

Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility 13

Reference to Lower Court Opinions

None of the opinions of the courts below are reported. In accordance with Supreme Court Rule 14.1(k), all are reproduced in the appendix.

Grounds for Jurisdiction

(i) Peeler seeks certiorari to review the January 19, 1994, opinion and judgment of the Fifth Circuit Court of Appeals.

(ii) Peeler's Motion for Rehearing was denied on February 16, 1994.

(iii) Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Statement of the Case

The operative facts of this case are simple, but alarming. They are recited in some detail in Peeler's Motion for §2255 Relief and accompanying exhibits, and reiterated in a separate chronology, both of which are included in the Appendix to the Petition. See Tr. 00134-165. Consistent with the admonitions of Rule 14(g), we recount only the most essential facts in "**concise**" fashion.

The gravamen of Peeler's Motion is that the Government offered her immunity, through her lawyer, in December of 1985, in exchange for her voluntary cooperation and truthful testimony, and that her lawyer chose not to tell her about the Government's offer or otherwise to pursue it because he was being "loyal to the others", i.e. the other potential codefendants and their counsel, all of whom were signatories to a joint defense pact.

According to the sworn testimony of the AUSA assigned to prosecute this case, he told Peeler's lawyer that "I would offer her immunity from the beginning of time to the end of the world as concerned the Hillcrest Securities activities." Exhibit 3 to §2255 Motion, Alexander Deposition at pp. 17-18. Subsequently, AUSA Alexander confirmed again that the offer was made. His affidavit stated simply that "on or about December 1-3, 1985, I made a definite, unambiguous offer of transactional immunity regarding all Hillcrest matters to Darrell Jordan, the attorney for Carol Peeler. Specifically, as best I recall, I advised Mr. Jordan that the government was willing to 'forgive all of Ms. Peeler's sins regarding the Hillcrest matter from the beginning of the world until the end of time' in exchange for her cooperation. The immunity offer extended to Ms. Peeler's husband as well, and would have prevented both of them from being indicted or prosecuted had Mr. Jordan

communicated Ms. Peeler's acceptance of the offer to me."

Darrell Jordan has admitted in sworn testimony that an effective or reasonable defense lawyer should communicate an offer of immunity to his client, and he has also admitted that he did not communicate any offer of immunity to Carol Peeler. Exhibit 9 to Motion, Jordan Deposition at pp. 7-9.

The question of why Jordan failed to communicate the offer is germane to the legal issue of prejudice under the applicable case law from this Court. The record before the Court demonstrates that the reason Jordan betrayed his own client was -- **in his own words**

> "we were remaining loyal to the other people".

Exhibit 10 to §2255 Motion, Deposition of Sally Giddens, **quoting Darrell Jordan**, at p.54. The "other people" were the lawyers and potential codefendants in the joint defense pact. The reason that Jordan thought that it was necessary

to put the question of immunity for his own client on the back burner was that, he and the other defense counsel had launched an end run around prosecutor Alexander via a joint defense stratagem known as the "GIDEON INITIATIVE". In order to give that initiative a chance to work, it was important that the prosecutor not perceive any "cracks in the dyke" [sic]". Exhibit 14 to §2255 Motion, HUGHES & LUCE internal memorandum dated January 21, 1986, to Darrell Jordan. Jordan made the decision to withhold the immunity offer from his client and to defer the opportunity for immunity, even though his associates had advised him in writing that "[t]he **risks of doing so are** that Bill [Alexander] will find another **crack in the dyke** [sic], or develop additional harmful information on Carol." Id.

Unfortunately for Carol Peeler, Jordan's unilateral decision to gamble with her freedom did not work out. Prosecutor Alexander found another crack in the dike in the

personage of Hillcrest principal Buzz Tompkins. Tompkins got immunity. Exhibit 18 to Motion (March 10, 1986 agreement between Tompkins and Government). Tompkins then shared some information with the government about the September 1982 "as of" trades. This information caused the government to alter the focus of its entire investigation and prosecution and to indict Peeler, her husband, and the other Hillcrest principals. Exhibits 5-8 to the Motion. Even though Peeler had been cleared by polygraph of having mens rea, (Exhibit 25 to Motion) the defense to this charge[1] was much more difficult because, indisputably, on two days in September of 1982, Peeler had executed trades "as of" earlier in that week. When Congress passed the tax bill in January of 1983 it made that portion of the law effective "as

---

[1] Peeler was actually charged with multiple violations of 18 U.S.C. §371, all stemming from the September 1982 "as of" trades. This was the basis of federal jurisdiction in the lower courts. See Rule 14(i), S.Ct.R.

of" September 22, 1982, thereby rendering the deductions arising out of those trades putatively unlawful. Consequently, she was persuaded by one of her HUGHES & LUCE lawyers that she was "guilty" and should plead guilty to one count of the 22 count indictment so that the charges against her husband would be dropped.

Peeler plead guilty on March 31, 1989. Several days later she learned for the first time -- from reporter Giddens -- that the Government had, in fact, offered her immunity before Buzz Tompkins and that her lawyer had failed to tell her about it.

Argument

I. BOTH THE FIFTH AND SIXTH AMENDMENTS REQUIRE THE GOVERNMENT TO "HONOR, RESPECT AND PRESERVE" PEELER'S CHOICE OF COUNSEL AS THE "ESSENTIAL MEDIUM" OF COMMUNICATION BETWEEN THE GOVERNMENT AND HERSELF.

A. The Sixth Amendment "Ineffective Assistance" Analysis is NOT Coextensive with the "Critical Phase -- Appointment of Counsel Issue. All of the courts below have denied Sixth Amendment relief to Peeler -- not on the substantive constitutional merits of her claim -- but rather because they believed that their hands were tied by a single phrase from this Court's one page, per curiam, opinion in **Wainwright v. Torna**, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982). For this reason only this Court can remedy the situation and do justice in this case. This is a **compelling** reason for the Court to grant certiorari.

The phrase is "[s]ince respondent had no constitutional right to counsel, he could not be deprived of

the effective assistance by his retained counsel's failure to file the application timely". 102 S.Ct at 1301.

The reasoning of the lower courts in applying that phrase has been that (a) because Peeler was not entitled to **appointed** counsel at this stage of the proceedings against her, then (b) she was not entitled to constitutionally effective representation from the lawyer whom she hired to represent her. This is not only illogical, but also inconsistent with other Sixth (and Fifth) Amendment case law.

In **Torna** habeas relief was denied to a petitioner who complained about his retained counsel's failure to seek **discretionary** review by the Florida Supreme Court, after he had already been convicted and his conviction upheld on direct appeal. In denying relief the Court made the statement quoted above. Taken out of the factual context of the case, this seems, at first blush, to make the Sixth Amendment appointment of counsel analysis coextensive

with the "ineffective assistance" claim. But the factual context of Torna was markedly distinguishable from the case of Carol Peeler. Torna had already been adjudicated as guilty in a proceeding which comported with due process; thus, he had no presumption of innocence. Peeler, by contrast, had not even been formally indicted, so she still enjoyed the presumption of innocence.[2]

More importantly, subsequent opinions from this Court make it clear that Torna should not be applied so mechanistically. Two years after Torna the Court handed down United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The Court denied relief. But in so doing it focused on the Sixth Amendment's right to **appointment** of counsel, and it carefully demonstrated that

---

[2] Chief Justice Rehnquist noted this important distinction in Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993 (1987).

this Sixth Amendment right and the Sixth Amendment right to effective counsel are not coextensive:

> The narrow issue before the Court of Appeals and before us today is whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondents' situation. **Respondents have not contended that they were denied the opportunity to retain their own private counsel . . . Respondents also have not asserted a Sixth Amendment ineffective-assistance-of-counsel claim . . .**

104 S.Ct. at 2296n.1 [emphasis added, citations omitted].[3]

---

[3] In view of this language in Gouveia which suggests that these Sixth Amendment rights are not necessarily coextensive, we do not address the more thorny issue of whether a person who is confronted with a prosecutor, a grand jury, and an immunity offer is at such a critical stage of the proceedings as to be entitled to appointment of counsel. Clearly Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), holds that the Sixth Amendment's right to counsel can attach before formal charges have been filed. So, too, does Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (defendant is entitled to appointed counsel at pre-indictment preliminary hearing). And certainly a person who does face that "skilled prosecutor" is in the very predicament that the Court envisioned in Gouveia and Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Although many courts view the plurality opinion in Kirby as establishing a "bright line" test, in fact the Court explained its constitutional concerns and the rationale for its holding in oft-quoted, practical, functional terms:

If the twin Sixth Amendment rights were coextensive, then this last sentence of Justice Rehnquist's opinion would be meaningless surplusage.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of **adversary criminal justice.** For it is only then that the government has **committed itself to prosecute,** and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant **finds himself** faced with the ***prosecutorial forces of organized society***, and immersed in the intricacies of substantive and procedural criminal law.

92 S.Ct. at 1882.

In December of 1985 Carol Peeler was confronted by very powerful "prosecutorial forces of organized society," including an experienced prosecutor who was telling her lawyer that he intended to convene a grand jury, summon her before that grand jury to testify, and, if she did not cooperate by accepting the immunity offer, he would ask that grand jury indict her. She was, in the words of Kirby deeply "immersed in the intricacies of substantive and procedural criminal law." If, as the Court held in Coleman a person is entitled to counsel at a pre-indictment hearing, then surely she would also be entitled to counsel when she was summoned before the grand jury to either testify or plead the Fifth. But see United States v. Williams, _____ U.S. _____, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992)

Therefore, if the Court retreats from the language of Gouveia, Peeler would ask the Court to carefully consider and apply these precedents to the peculiar facts of her case and hold that she was entitled to counsel at this juncture.

Other Sixth Amendment cases demonstrate what obligations the government has once an accused person has counsel. For example in **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985), this Court upheld the exclusion of taped confessions which were obtained by a police informant **after** Moulton had **invoked** his right to **hire counsel**. After quoting from other cases about the fundamental nature of the right to counsel, the importance of having the "guiding hand of counsel at **every stage** of the proceedings against him", and observing that "the right to the assistance of counsel is shaped by the need for the assistance of counsel . . . at earlier, 'critical' stages in the criminal justice process '**where the results might well settle the accused's fate**" the Court stated something that would seem to be a constitutional truism:

> Once the right to counsel has attached and been asserted, the State **must** of course **honor it**.

474 U.S. at 170 (emphasis added). The Court went on to elaborate: "This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an **affirmative obligation to respect and preserve** the accused's choice to seek this assistance." Id. at 170-71 (emphasis added).

In a footnote the Court explained one of the reasons that the government must "honor, respect and preserve" the attorney client relationship and the role of the lawyer as liaison between his client and the government: "'[T]he lawyer is the **essential medium** through which the demands and commitments of the sovereign are communicated to the citizen.'" Id at 171n.7, quoting **Brewer v. Williams**, 430 U.S., 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). See also 474 at 187-88 (Burger, C.J., dissenting) which quotes the ethical limitation of Disciplinary Rule 7-104(A)(1) of the

American Bar Association's Code of Professional Responsibility.[4]

This constitutional admonition to "honor, respect and preserve" the right to counsel clearly does not depend on whether the defendant is in the post-indictment "critical" phase at which he has a Sixth Amendment right to **appointed** counsel. The obligation also extends to a preindictment suspect who asserts his **Fifth** Amendment right to counsel. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Recently the Court observed that "[p]reserving the integrity of an accused's choice to

---

[4] The Court reiterated the point again in Patterson v. Illinois, 487 U.S. 285, 290n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988):

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. **Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.**

communicate with police only through counsel is the essence of *Edwards* and its progeny". **Patterson v. Illinois**, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).[5]

In **Michigan v. Jackson**, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); the Court affirmed the overturning of a murder conviction because the police had obtained incriminating evidence after the accused had **asserted** his right to counsel. The holding demonstrates again that, for constitutional purposes, it really does not matter whether the right to have counsel emanates from a Sixth Amendment obligation on the government to provide/appoint counsel, or from a Fifth Amendment choice to request or retain counsel. Rather, its holding was "grounded in the understanding that 'the **assertion** of the

---

[5] In **Patterson** the Court held that the waiver analysis of the right to counsel is essentially the same, regardless of whether that right emanates from a pre-indictment Fifth Amendment invocation of counsel, or a post-indictment Sixth Amendment right.

right to counsel [is] a significant event,'" 106 S.Ct. at 1410-11, citing and quoting **Edwards v. Arizona**, *supra*, and **Maine v. Moulton**, *supra*.

Under the teachings of these subsequent cases, once a criminal target is represented by counsel, there is no difference for Sixth Amendment "effectiveness" purposes between counsel retained by the defendant himself and counsel appointed to represent an indigent defendant. **Cuyler v. Sullivan**, 464 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)(a person is not foreclosed from asserting an ineffective assistance claim merely because he hired the lawyer in question).[6]

---

[6] In addition to the distinction between defendants with retained vs. appointed counsel, some of the older cases also distinguished between adjudications of guilt vs. guilty pleas. That distinction, too, is no longer of any constitutional significance. **Hill v. Lockhart**, 474 U.S. 52, 106 S.Ct. 366, 369-71, 88 L.Ed.2d 203 (1985)(ineffective assistance of counsel can vitiate guilty plea).

The application of these principles to the case at bar is simple. Once Peeler exercised her constitutionally mandated[7] right to hire counsel, the government was obliged to use that lawyer as the "essential medium" to convey the offer of immunity. Prosecutor Alexander could not call Carol Peeler directly to offer her immunity. And when that lawyer chose to sacrifice his client's liberty out of "loyal[ty] to the others", his constitutional deficiencies are necessarily imputed to the government itself. **Kimmelman v. Morrison**, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) That would be so even if the government was not aware of the ineffective assistance. But, *a fortiori* is it so where, as here, the prosecutor and other government officials were aware in early 1986, shortly after the offer was made, that Jordan failed to convey the offer of immunity; but Peeler

---

[7] In addition to the Fifth and Sixth amendments, the contract clause of the Constitution also confers an inalienable right to hire a lawyer.

herself did not become aware until April of 1989, three days after she plead guilty to a technical *malum prohibitum* offense on the advice of the same law firm.

B. Peeler Is Also Entitled to Relief under the Fifth Amendment. As we have seen, the Fifth Amendment also obligates the government to "honor, respect and preserve" the role of counsel as the "essential medium" for communications between the government and the accused. **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); **Patterson v. Illinois**, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

Correlative to the government's obligation to respect the role of defense counsel, counsel also has a duty to render constitutionally effective representation. The Fifth Amendment guarantee of due process, like the Sixth Amendment, also safeguards this right. Therefore, ineffective assistance claims are also cognizable under this

Amendment. **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed. 821 (1985) is a due process "ineffective assistance" case. It holds that **due process** requires a criminal defendant to have effective assistance of counsel on his first appeal as of right. It, thus, affirmed the granting of the Great Writ. In **Evitts** the Court was confronted with an argument by the state of Kentucky that is extremely analogous to the reasoning of the courts below. Kentucky argued that, because the Constitution does not require a state to have any system of appeals as of right in the first instance, then the fact that a defendant might get ineffective representation in the course of the gratuitous appeal that is present is inconsequential. The Court rejected this argument resoundingly because it recognized that **due process** was a broader concept which required courts to take the situations as they were presented to them and make sure that they

comported with the requirement for fundamental fairness. *Id.* at 838-39.

The lesson of **Evitts** is clear: if the state has an appeal (even one that is not constitutionally required), **due process** requires counsel to be effective in handling that appeal; similarly, because Peeler had a lawyer (regardless of whether or not the government was obliged to appoint one to represent her at this juncture), due process required him to be loyal and effective. If he is not, his ineffectiveness is imputed to the government. Or, to reiterate it in the words of **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. at 484, 88 L.Ed.2d 481 (1985), once Peeler had chosen to have counsel, the government was constitutionally obliged to "honor, . . . respect and preserve" her choice.

Several times during the course of the **Evitts** opinion, the Court analogized the plight of Lucey to "one who has no counsel at all." *Id.* at 836; also, 835n.6. Its reasoning was

that, if the benefits which a person received from his representation were really not much better than a person who had "no counsel at all", then the person is entitled to relief under the Constitution. Ironically, the facts in the case before this Court graphically illustrate that Carol Peeler would have been much better off if she had had "no counsel at all", because then the prosecutor would have been ethically obliged to communicate the immunity offer directly to Peeler and she would have then been aware that she had been offered a reasonable and expedient exit from the criminal process. She could have made her own decision. And, as the record evidence indicates, she would have accepted the offer, conditioned, as it was, only on her willingness to tell the truth. For this reason the Court of

Appeals erred in not even reaching the Fifth Amendment argument.[8]

C. Jordan's Deficient Representation Prejudiced Peeler.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), establishes the twin prongs for substantive analysis of the ineffective assistance claim. There is little dispute[9] about whether or not the record facts satisfy both prongs of the test.

---

[8] The Fifth Circuit refused to address Peeler's Fifth Amendment argument because her pleadings and briefings did not differentiate between the Fifth and Sixth amendment arguments until she filed her objections to the Magistrate's report and recommendation. Contrary to the panel's opinion, this was properly before the district court because 28 U.S.C. §636(b)(1) provides for *de novo* review.

[9] In some cases there would be a need to remand for an evidentiary hearing to decide two fact issues: (i) whether or not the immunity offer was made, and (ii) whether it was communicated to Peeler or not. There is no need for an evidentiary hearing in this case because both points are established by the prosecutor's own testimony. AUSA Alexander testified that he made the offer, and also that he learned shortly thereafter that it had not been communicated to Peeler. His testimony about the offer being made was corroborated by two IRS agents who heard him make the offer, and his testimony about the lack of communication was readily admitted by Jordan himself.

First, both prosecutor Alexander and defense counsel Jordan have testified that the standard of reasonable representation would require communication of an immunity offer. So deficient representation is established as a matter of fact. Even absent this testimony, however, it would likely be established as a matter of law under the holdings of this Court. In **Strickland** itself the Court acknowledged that the professional norms for defense counsel include a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. at 2065.

Similarly, the prejudice component is established.[10] In **Strickland** the Court observed that there are some

---

[10] The test of prejudice is still the same. As Justice O'Connor pointed out in her concurring opinion in **Lockhart v. Fretwell**, ____ U.S. ____, 113 S.Ct. 838, 845, 122 L.Ed.2d 180 (1993) "[t]he determinative question [under **Strickland**] -- whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' -- remains unchanged."

circumstances which are so inherently prejudicial that, when shown, prejudice is **conclusively presumed**. One such circumstance is to show a **conflict of interest** that affected counsel's performance. The reason that this species of ineffective assistance is so pernicious is

> [i]n those circumstances counsel breaches the **duty of loyalty, perhaps the most basic** of counsel's duties.

Id. 104 S.Ct. at 2067. Accord **Cuyler v. Sullivan**, 464 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Again, the facts of this case squarely meet this component of the **Strickland** test. The reason that Darrell Jordan failed to pursue immunity for Carol Peeler in a timely manner -- according to Mr. Jordan's own admission to reporter Sally Giddens -- was that

" we were remaining loyal to the other people".

(Deposition of Sally Giddens, **quoting Darrell Jordan.)**

Thus, if this Court truly meant what it said in Michigan v. Jackson, *supra*, when it wrote that "'the **assertion** of the right to counsel [is] a significant event,'" which must be "honored", "respect[ed] and preserve[d]" then Peeler's conviction must be overturned.

II. THE FIFTH CIRCUIT'S HANDLING OF THE CASE ALSO VIOLATES DUE PROCESS

Peeler would prefer that this Court accept certiorari on the substantive constitutional merits of her ineffective assistance claims and avoid this issue altogether. However, because the Fifth Circuit's[11] handling of her appeal "has so far departed from the accepted and usual course of judicial proceedings" Rule 10.1(a), S.Ct.R., Peeler would be remiss if she did not point out this defect to the Court and ask, as an alternative remedy, that this Court reverse the opinion of

---

[11] This point of error is brought most reluctantly. The undersigned counsel began his legal career as a law clerk for the late John R. Brown, then Chief Judge of the Fifth Circuit. Consequently, he has a great appreciation for the legacies of that great court and some understanding of the burdens which face the judges of that court. The Fifth Circuit's long-standing summary calendar procedures are a necessary and important tool for assisting the court in its workload. On the other hand, the reason that it has worked well for the Court is that the Court itself has been scrupulously sensitive to the procedural regularity of summary disposition without oral argument. It has assigned screening cases to all active judges "selected in rotation" and has "carefully separated" the functions of judge assignments and calendaring of cases.

the court below and remand the case for reconsideration by a randomly chosen panel.

In accordance with the "screening" procedures employed by the Fifth Circuit this case was originally scheduled for oral argument. This means that at least one of the three judges on the screening panel thought that the case merited oral argument. However, unbeknownst to Peeler, apparently one of the judges on the oral argument panel decided *sua sponte* to recuse himself from the oral argument panel. The other two judges on the panel then instructed the clerk to advise counsel that the case would be decided on the briefs without argument. On November 9, 1993, the remaining two judges issued an unpublished, per curiam opinion affirming the denial of relief. A footnote to this opinion indicates that these two judges decided the case as a quorum of the scheduled oral argument panel under the ostensible authority of 28 U.S.C. §46(d). Peeler filed a

Motion for Rehearing arguing that summary disposition by a two judge court without oral argument was violative of Rule 34, Fed.R.App.P. On December 29, 1993, the panel granted the Motion and vacated its opinion, ordering that "the case will be resubmitted to a three-judge panel".

At this point justice and due process required the complete reassignment of the case to another panel of judges who had not already made up their minds about the substantive issues in the case -- either a new, standard screening panel, or a regularly scheduled oral argument panel.

The reason for this is clearly stated in the Fifth Circuit's Internal Operating Procedures:

> **To insure complete objectivity** in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignment to panels and (2) calendaring of cases are **carefully separated**.

That was not done. The Fifth Circuit clerk's office advised Peeler's counsel that the third member of the panel was specifically requested by the junior judge on the original panel to participate in the resolution of this case.[12] The result is the reissuance of the same, per curiam, unpublished opinion previously rendered by the ostensible two judge quorum.

Peeler has been unable to find any reported opinion from this Court in which the constitutional implications of panel gerrymandering were considered. The only time known to counsel at which a judge of the Fifth Circuit was accused of such conduct was in Judge Cameron's scathing dissent in **Armstrong v. Board of Education**, 323 F.2d

---

[12] Unfortunately this is not in the record and not available to Peeler's counsel. However, if the Court grants the writ on this issue, Peeler will request that this Court order the augmentation of the record by directing the clerk of the Fifth Circuit to forward to this Court the back page of the docket sheet and any internal memoranda regarding the selection of the panel which ultimately resolved the case.

333, 352-59 (5th Cir. 1963), cert. denied 376 U.S. 908 (1964), which hails from an extremely divisive period in the Fifth Circuit's history. Cf **Akins v. Texas**, 325 U.S. 398, 400n.1, 65 S.Ct. 1276, 1278n.1, 89 L.Ed. 1692 (1945).

However, there are reasonable analogies. For example, this Court has a long history of reviewing the selection process for **juries** to make sure that they were truly "impartial" and "indifferent". E.g. **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639 (1961). Is it any less important that the **judges** who are assigned to hear cases are chosen randomly and impartially, and that they come to the case with no preconceived notion? Of course not.

The deprivation of due process to Peeler is clear. Moreover, because this case involves a professional betrayal by a very highly visible Texas lawyer[13] and has attracted a

---

[13] The Court can take judicial notice that Mr. Jordan is the former President of the Texas Bar Association.

fair amount of media attention already, it not only jeopardizes justice in this case, but undermines public confidence in the procedures of the federal courts as a whole. Therefore, it cries out "for an exercise of this Court's power of supervision." Rule 10.1(a).

Conclusion

Since **Strickland** a host of ineffective assistance attacks have been launched -- usually by *pro se* prisoners who do not understand the stringency of the twin requirements of that case. Most have failed. One apparent reason for this is that **most** defense counsel are both competent and loyal. However, this is an extraordinary case. The well-documented motion for relief under §2255 demonstrates a blatant betrayal of the client's interests by a very highly paid defense lawyer, . . . and the government knew all about it.

A person accused of a crime has many forces aligned against him. All of the power of the government -- police and prosecutor -- are arrayed against him. Many times friends and family might turn against him. And the best that he can hope for from the bench is impartiality. But the Constitution contemplates that there is one person who will stand by him. There is one person in whom he could confide his sins and his fears with confidence that this information is protected from disclosure by a sacred privilege. There is one person from whom he could expect and require unswerving fidelity. There is one person who will interpose himself between the accused and the government and serve as the "essential medium" for communication between them. That person is the accused's lawyer. And the constitutional precedents of this Court unambiguously require the government to "honor, respect and preserve" the role and function of that person.

Carol Peeler hired such a person -- a former prosecutor turned prominent lawyer, bar politician and partner in a prestigious Dallas law firm. The government conveyed its offer of immunity to this "essential medium". He failed to tell her about it because he had a different agenda and conflicting loyalties. The government knew it; Peeler did not. Under these unique circumstances Peeler was denied constitutionally effective representation.

Only this Court can rectify that error. On the authority of the numerous opinions of this Court set forth herein, Peeler implores the Court to grant the writ of certiorari, and, after reviewing the merits to "**vacate and set the judgment aside and . . . discharge the prisoner**". 28 U.S.C. §2255.

Respectfully submitted

ARCHER, WALDNER & VICKERY

(Signed) Arnold Anderson Vickery

Arnold Anderson Vickery
S.D. Fed. I.D. No. 4470
Texas State Bar No. 20571800
2929 Allen Parkway, Suite 2770
Houston, Texas 77019
(713) 526-0700

PROOF OF SERVICE
CERTIFICATE OF SERVICE

Pursuant to Rule 29.3 of the Rules of the Supreme Court of the United States, I certify that three copies of the Petition for Writ of Certiorari has been served on Robert D. Lindsay, Chief, Criminal Division, Department of Justice - Tax Division, 10th & Constitution Avenue, N.W., Suite 4131, Washington, D.C. 20530 via first class postage prepaid, on this 4th day of May, 1994.

(Signed) Arnold Anderson Vickery